

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has established an occupational disease in the performance of duty as alleged.

## **FACTUAL HISTORY**

On June 27, 2017 appellant, then a 62-year-old retired licensed vocational nurse, filed an occupational disease claim (Form CA-2) alleging that new diagnoses of the right knee, both shoulders, and lower back as well as head pain and memory loss were due to previous injuries. On the claim form, A.K., an employing establishment workers' compensation specialist, noted the date of last exposure to employment duties was July 16, 2014. She indicated that appellant retired on disability December 11, 2014 and noted that the instant claim appeared a consequential injury related to an accepted injury under OWCP File No. xxxxxx624.<sup>3</sup> OWCP adjudicated the instant claim under File No. xxxxxx930.

In a July 17, 2017 development letter, OWCP acknowledged receipt of appellant's claim and informed her that additional factual and medical evidence was needed to establish her claim. It advised her of the type of evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In e-mail correspondence dated July 17, 2017, A.K. reiterated that she believed appellant was actually claiming new diagnoses from the accepted injury in OWCP File No. xxxxxx624. In correspondence dated July 17, 2017, she challenged the timeliness of the claim. In July 20, 2017 e-mail correspondence, A.K. indicated that appellant last worked at the employing establishment in March 2014.

By decision dated August 24, 2017, OWCP denied the claim finding that appellant had not responded to the development letter and that there was insufficient evidence to establish fact of injury.

On August 31, 2017 counsel requested a hearing with a representative of OWCP's Branch of Hearings and Review.

By decision dated December 7, 2017, an OWCP hearing representative indicated that, based on her preliminary review, the August 24, 2017 decision must be set aside. She remanded the case to OWCP for further development to determine if appellant's claim was timely filed.

On December 11, 2017 OWCP forwarded an additional development letter to appellant with an attached questionnaire on the issue of timeliness for her completion. Appellant was afforded 30 days to submit the requested information.

In a second letter also dated December 11, 2017, OWCP asked the employing establishment to provide information regarding the date appellant last worked prior to being placed on limited duty and the date of retirement; a copy of a Standard Form 50 (SF-50) that documented

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<sup>3</sup> The record indicates that this claim was for a July 25, 2012 traumatic employment injury.

her retirement; and a statement from a knowledgeable supervisor as to the date appellant last worked in a regular, unrestricted capacity, the date she began limited duty, and the date of retirement. OWCP asked that the employing establishment respond within 30 days.

The employing establishment responded and provided a Form SF-50 which indicated that appellant retired on disability effective December 11, 2014. Additional information noted that appellant's last day working in a non-restricted status was July 24, 2012, the day before a July 25, 2012 employment injury, and that she was taken off work on July 17, 2014.

On January 17, 2018 counsel informed OWCP that appellant related that her last day of work was May 26, 2014 when she stopped work to undergo knee surgery.

By decision dated January 23, 2018, OWCP found that appellant's CA-2 form indicated that she first became aware of her claimed conditions on October 25, 2012 and denied her claim finding that pursuant to section 8122 of FECA, it was not timely filed.

On January 30, 2018 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review. Additional evidence submitted in support of the claim included progress notes dated April 10, May 13, and August 12, 2014 in which Dr. Jyothi Kundur, Board-certified in family medicine, noted examining appellant for knee and shoulder pain secondary to a motor vehicle accident in 2012. Dr. Kundur described examination findings and diagnosed hypertension and back and knee pain. In progress notes dated April 30, 2014 to May 27, 2016, Dr. Ayham Shneker, Board-certified in internal medicine, also reported a history of a motor vehicle accident in 2012 and that appellant had left knee arthroscopic surgery in May 2014. He described examination findings. Dr. Shneker diagnoses included hypertension as well as knee and back pain. Appellant also submitted notes dated June 24, 2015 and June 13, 2016 from Mary Neez, a physician assistant, and a June 22, 2018 physical therapy discharge note.

At the hearing, held on July 13, 2018, appellant described the July 25, 2012 injury and indicated that she also injured her right side that day when she was hit by a patient in a wheelchair. Counsel asserted that this claim was for a traumatic injury resulting in a right-side condition due to the accepted July 25, 2012 employment injury.

By decision dated September 27, 2018, the hearing representative denied appellant's occupational disease claim. He found that, as the record did not establish an occupational disease, the question of whether appellant's claim was timely filed was moot. The hearing representative noted that the medical evidence submitted made no mention of the July 25, 2012 injury, noted a 2012 motor vehicle accident, and mostly referred to underlying conditions such as hypertension. He advised that upon return of the case record, it should be combined with OWCP File No. xxxxxx624.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United

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<sup>4</sup> *Supra* note 2.

States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.<sup>6</sup> In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation, for disability or death must be filed within three years after the injury or death.<sup>7</sup>

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his or her condition and federal employment. Such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.<sup>8</sup>

Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability.<sup>9</sup> The Board has emphasized that an employee need only be aware of a possible relationship between his or her condition and his or her employment to commence the running of the applicable statute of limitations,<sup>10</sup> and that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.<sup>11</sup>

Even if a claim is not filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate superior had actual knowledge of his or her alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.<sup>12</sup> The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>13</sup>

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<sup>5</sup> *D.J.*, Docket No. 18-0620 (issued October 10, 2018).

<sup>6</sup> *R.T.*, Docket No. 18-1590 (issued February 15, 2019); see *Charles W. Bishop*, 6 ECAB 571 (1954).

<sup>7</sup> *Id.*

<sup>8</sup> See *R.T.*, *supra* note 6.

<sup>9</sup> 5 U.S.C. § 8122(b).

<sup>10</sup> *R.T.*, *supra* note 6.

<sup>11</sup> *D.R.*, Docket No. 18-1754 (issued April 4, 2019).

<sup>12</sup> 5 U.S.C. §§ 8122(a)(1), 8122(a)(2).

<sup>13</sup> *D.R.*, *supra* note 11.

It is the employee's burden of proof to establish that a claim is timely filed.<sup>14</sup>

### **ANALYSIS**

The Board finds that appellant has not established an occupational disease in the performance of duty as her claim is barred by the applicable time limitations provisions of 5 U.S.C. § 8122(a).

In the September 27, 2018 decision, the hearing representative found that, as the record did not establish an occupational disease, the question of whether appellant's claim was timely was moot. However, as noted, the issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes a determination on the merits of the claim.<sup>15</sup>

Counsel informed OWCP that appellant related that her last day of work was May 26, 2014 and that she had stopped work to undergo knee surgery the next day. Appellant filed the instant occupational disease claim on June 27, 2017, a date which is more than three years after the date of last exposure. Consequently, she filed her claim outside the three-year limitation period.<sup>16</sup>

The Board also finds that appellant has not alleged and there is no evidence of record that this is a case of latent disability,<sup>17</sup> and she has not established that her immediate supervisor had actual knowledge, within 30 days of alleged injury, that continued factors of her federal employment caused a new occupational injury.<sup>18</sup> Appellant has therefore not established that this occupational disease claim was timely filed.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant's occupational disease claim is barred by the applicable time limitation provisions of 5 U.S.C. § 8122(a).

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<sup>14</sup> A.S., Docket No. 18-1094 (issued February 7, 2019).

<sup>15</sup> *Supra* note 6.

<sup>16</sup> *D.R., supra* note 11.

<sup>17</sup> *Supra* note 11.

<sup>18</sup> *Supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: July 15, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board